



THURBERT E. BAKER
ATTORNEY GENERAL

Department of Law
State of Georgia

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

OFFICIAL OPINION

The Honorable Sonny Perdue
Governor
State Capitol
Atlanta, Georgia 30334-0900

Re: Under general law, Georgia boards of education are not empowered to share services by creating and utilizing a nonprofit corporation such as the Consortium for Adequate School Funding in Georgia, Inc., for the purpose of challenging state school funding by litigation or otherwise.

Dear Governor Perdue:

This responds to your request for an official opinion regarding whether Georgia boards of education are permitted to utilize state or local school funds to pay dues to the Consortium for Adequate School Funding in Georgia, Inc. ("Consortium").

Your request describes the Consortium as a nonprofit corporation formed to obtain additional support from the State in the financing of schools in Georgia whose activities include funding and directing litigation against the State in an effort to obtain increased State education funding as well as public relations related to the effort to obtain increased State education funding. Some school systems are members of the Consortium and pay dues, presumably from state or local school funds, in order to fund the Consortium's activities.¹

Your request focuses primarily on whether the expenditure of funds by boards of education to fund the Consortium violates article VIII, section VI, paragraph I of the Georgia Constitution or O.C.G.A. § 20-2-411. Although not raised in your request, a threshold legal issue is whether boards of education are empowered by general law to

¹ Through the Consortium's website at <http://www.casfg.org> one can view a copy of the Consortium's Response to the State Defendants' Motion for Summary Judgment ("Response") in *Consortium for Adequate School Funding in Georgia, Inc. v. The State of Georgia*, Civil Action No. 2004CV91004 in the Superior Court of Fulton County, which case the Consortium voluntarily dismissed without prejudice. In the Response, the Consortium describes itself as "a nonprofit corporation ... formed by several school district superintendents."

create and utilize a nonprofit corporation like the Consortium to act on behalf of the boards for the purpose of pursuing litigation against the State and other activities related to school funding. A previous opinion of the Attorney General concluded that county boards of education are not authorized by law to form a nonprofit corporation to be utilized as an agent for procurement and other functions. 1978 Op. Att’y Gen. 78-4; *see also* 1992 Op. Att’y Gen. 92-1. 1978 Op. Att’y Gen. 78-4 reaches its conclusion for two reasons. First, school officials can only perform acts that are expressly authorized by law or are clearly implied by express provisions of law. Second, the law on nonprofit corporations did not then include governmental entities among permitted incorporators or members for nonprofit corporations.

The law regarding nonprofit corporations now includes governmental entities as permitted incorporators of nonprofit corporations. *See* O.C.G.A. §§ 14-3-140(14), (17), (22), (24), and (30); 1992 Op. Att’y Gen. 92-1. However, notwithstanding the changes in the nonprofit corporation code since the issuance of 1978 Op. Att’y Gen. 78-4, local school boards still cannot form or be members of a nonprofit corporation. The changes in the nonprofit corporation law since the issuance of 1978 Op. Att’y Gen. 78-4 allow its use by a governmental entity if the entity is otherwise empowered to incorporate or become a member of a nonprofit corporation. An entity created by the State “has only such powers as the legislature has expressly, or by necessary implication, conferred upon it.” *Bentley v. State Bd. of Med. Exam’rs*, 152 Ga. 836, 838 (1922); *Floyd County Bd. of Comm’rs v. Floyd County Merit Sys. Bd.*, 246 Ga. 44, 45 (1980); *Bryant v. Employees Ret. Sys. of Georgia*, 216 Ga. App. 737, 738 (1995). Local school systems and their boards of education are creations of the State. GA. CONST. art. VIII, § V, ¶¶ I and II; O.C.G.A. § 20-2-50. Under the Constitution, county boards of education must have a statutory power to form nonprofit corporations or to pursue other joint administrative authority.²

² GA. CONST. art. VIII, § V, ¶ V provides that:

(a) Any two or more boards of education may contract with each other for the care, education, and transportation of pupils and for such other activities as they may be authorized by law to perform.

(b) The General Assembly may provide by law for the sharing of facilities or services by and between local boards of education under such joint administrative authority as may be authorized.

Thus, apart from intergovernmental contracts, “joint administrative authority” among local boards of education can only be exercised if “provide[d] by law.” *See generally* 1975 Op. Att’y Gen. U75-32 (addressing ability of board of education to enter into intergovernmental contracts for care, education, and transportation of students). After 1975 Op. Att’y Gen. U75-32, the Georgia Constitution was amended as quoted above to provide in art. VIII, § V, ¶ V(b) that if otherwise authorized by law, county boards of education could share facilities and services “under such joint administrative authority as may be authorized [by the General Assembly].” However, as the General Assembly has not authorized county boards of education to create or utilize a nonprofit corporation such as the Consortium, the provision in GA.

Although the General Assembly has not authorized county boards of education to incorporate or become members of nonprofit corporations, the General Assembly has enacted legislation specifically authorizing other creations of the State to form or become members of nonprofit corporations. *See, e.g.*, O.C.G.A. § 12-3-524(22) (the Georgia Music Hall of Fame Authority has the power “[t]o incorporate one or more nonprofit corporations as subsidiary corporations of the authority”); O.C.G.A. § 37-2-6.1 (“[a] community service board may create, form, or become a member of a nonprofit corporation”); O.C.G.A. § 50-26-8(a)(27) (the Georgia Housing and Finance Authority has the power “[t]o incorporate one or more nonprofit corporations as subsidiary corporations of the authority . . . [and] [t]he members of the board of directors of the authority shall constitute the members of and shall serve as directors of any subsidiary corporation”); O.C.G.A. § 50-34-6(a)(25) (the OneGeorgia Authority has the power “[t]o incorporate one or more nonprofit corporations as subsidiary corporations of the authority . . . [and] [t]he members of the board of directors of any such corporation shall be appointed by the authority and may include persons who are members of the authority”).³ The fact that the General Assembly has expressly granted powers to these creations of the State regarding the incorporation of nonprofit corporations supports the conclusion that the boards of education, which lack express powers, do not have the authority to create and utilize nonprofit corporations such as the Consortium. Thus, as the Consortium is described in your request and by the Consortium itself, the creation of the Consortium by the local school boards is unauthorized.⁴

CONST. art. VIII, § V, ¶ V(b) cannot be relied upon and the combination of certain school boards through the Consortium is improper.

³ Also worth noting in this regard are the provisions of O.C.G.A. § 50-8-35(f) regarding the creation of nonprofit corporations by regional commissions or their predecessors which appear to have been enacted in response to an opinion of the Attorney General finding a lack of authority in regional development centers to create nonprofit corporations. 1992 Op. Att’y Gen. 92-1.

⁴ A 1974 opinion involved the question whether a local school board could expend school funds to pay membership dues to the Georgia High School Association, but provides little guidance in this matter because it does not address the general authority of school boards to establish a nonprofit corporation or other joint administrative authority to conduct school business. 1974 Op. Att’y Gen. 74-72. In considering the issue presented, 1974 Op. Att’y Gen. 74-72 largely concluded that a case-by-case analysis is required regarding whether a particular expenditure of school funds is authorized. Since the issuance of 1974 Op. Att’y Gen. 74-72, the General Assembly has expressly addressed the general law issue and has authorized schools to join “athletic associations.” *See* O.C.G.A. §§ 20-2-316, 20-2-316.1. These statutes simply authorize schools to participate in a private organization that schedules and regulates sports for public and private schools. The situation in which schools join athletic associations for the purpose of scheduling and regulating sporting events is distinct from the situation in which a board becomes a member of a nonprofit corporation, which may perform functions that would otherwise be the responsibility of the local boards of education. The fact the General Assembly has expressly authorized schools to participate in a specific association by name provides additional support for the conclusion that local school boards are not generally empowered to form nonprofit corporations such as the Consortium. Further, if the General Assembly determined to permit local school boards to form nonprofit corporations such as the Consortium, legislation would have to be appropriately drafted to ensure that the creation of such corporations did not impermissibly permit the delegation of the powers of the boards to nonprofit corporations. *See Rogers v.*

County boards of education do not have the express or implied power to create a nonprofit corporation like the Consortium. Therefore, in light of the absence of authority for school boards to create the Consortium, it is unnecessary to address your request regarding whether state or local school funds can be properly expended by local school boards to pay dues to the Consortium.

Therefore, it is my official opinion that, under general law, Georgia boards of education are not empowered to share services by creating and utilizing a nonprofit corporation such as the Consortium for Adequate School Funding in Georgia, Inc., for the purpose of challenging state school funding by litigation or otherwise.

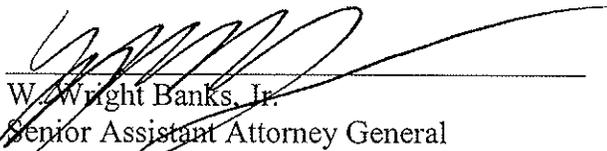
Issued this 2nd day of February, 2009.

Sincerely,

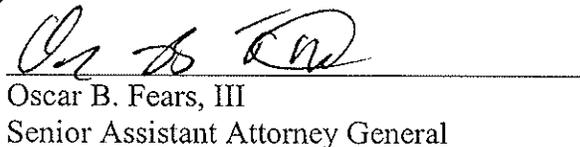


THURBERT E. BAKER
Attorney General

Prepared by:



W. Wright Banks, Jr.
Senior Assistant Attorney General



Oscar B. Fears, III
Senior Assistant Attorney General